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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NUMBER 76-661

ROBERT LEE WOOLEN, GALE NORMAN KEELIN
MARSHALL BUCK WOOLEN and BUCK EUGENE WOOLEN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS FOR

THE NINTH CIRCUIT

ROBERT LEE WOOLEN,
GALE NORMAN KEELIN,
MARSHALL BUCK WOOLEN and
BUCK EUGENE WOOLEN,
Petitioners

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ROBERT LEE WOOLEN;
GALE NORMAN KEELIN;
and
MARSHALL BUCK WOOLEN

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The petitioners ROBERT LEE WOOLEN, GALE NORMAN KEELIN, MARSHALL BUCK WOOLEN and BUCK EUGENE WOOLEN, request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 13, 1976.

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OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the District of Arizona.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 13, 1976. A timely Petition for Rehearing was denied on August 31, 1976, and this Petition for Certiorari was filed within thirty (30) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether it constituted reversible error to allow all of the petitioners herein to proceed to trial on

both Count I and Count III of the Indictment.

2. As to the petitioners BUCK EUGENE WOOLEN and MARSHALL BUCK WOOLEN, whether it was reversible error to allow their trial to proceed together with that of the petitioners GALE NORMAN KEELIN and ROBERT LEE WOOLEN.

3. Whether petitioners ROBERT LEE WOOLEN and GALE NORMAN KEELIN were denied their constitutional right to a fair trial due to the ineffective assistance of their counsel.

4. Whether all petitioners were denied their constitutional right to a trial by a fair and impartial jury as a result of an improper voir dire examination.

5. Whether the closing argument of the prosecutor denied all petitioners their right to a fair trial by an impartial jury.

6. Whether the evidence in the case at bar was clearly insufficient to support a conviction of any of the petitioners on Count I of the Indictment and petitioners BUCK EUGENE WOOLEN and MARSHALL BUCK WOOLEN on Counts II and III of the Indictment.

STATUTORY PROVISIONS INVOLVED

All statutory provisions involved are cited in the Index to this Petition for Certiorari. Due to space limitations they are not set forth *in haec verba*.

STATEMENT OF THE CASE

Petitioners were charged by way of a four (4) count Indictment with violations of Title 18, United States Code, §§ 371 and 659, and with violations of Title 21, United States Code, §§ 841(a)(1)

and 846. Count I of the Indictment charges all petitioners with having conspired to steal goods having a value in excess of one hundred dollars ($100) from an interstate shipment of freight in violation of Title 18, United States Code, § 371. Count II charges petitioners MARSHALL BUCK WOOLEN and BUCK EUGENE WOOLEN with theft of goods whose value exceeds one hundred dollars ($100) from an interstate shipment of freight in violation of Title 18, United States Code, § 659. Count III charges all appellants with having conspired to possess hydromorphone with intent to distribute in violation of Title 21, United States Code, § 841(a)(1). Clerk's Record on Appeal, pages 28 and 29. (Hereinafter this volume will be referred to as "CR"; the number following will refer to the page; and the number following "L" will refer to the line of the page.

The Reporter's Transcript of the trial will be referred to as "RT". The Reporter's Transcript of the Sentencing shall be referred to as "RTS".)

This matter was tried by jury on December 17 and 18, 1975. On December 19, 1975, the jury returned verdicts of guilty as to all petitioners as charged in the Indictment. The jury also returned a special verdict stating that the value of the hydromorphone exceeded one hundred dollars ($100). (CR 208-212; RT 361, L 6-25; 362, L 1-12).

The following evidence and facts pertinent to this appeal were adduced at the trial of this matter.

Subsequent to empaneling of the jury, Mr. Pete Rubi, counsel for petitioner ROBERT LEE WOOLEN informed the Court that ROBERT LEE WOOLEN was running a temperature of one hundred and two degrees (102°). The Court inquired why

this had not been brought to the Court's attention prior to this time and stated that the trial would have to go forward. (RT 23, L 7-12).

Robert Griffith, an employee of Wyeth Labs, over objection of counsel, testified as to the usual procedure of loading narcotic substance for transit. (RT 55, L 12-25; RT 56, L 1-7). Griffith stated that on August 20, 1975, he was on duty when petitioner MARSHALL BUCK WOOLEN received a load of goods at Wyeth Labs. (RT 61, L 19-25; 62, L 1-10). Griffith testified that he had no recollection of any boxes having broken during the loading process. (RT 62, L 17-25). On cross-examination Griffith stated that he did not actually see petitioner WOOLEN'S trailer being loaded. (RT 77, L. 1-15). He stated that he had no recollection of that particular trailer. (RT 78, L 25; RT 79,

L 1-4).

William B. Thomas, Jr., an employee of Wyeth Laboratories at East Whiteland Township, Pennsylvania, testified that on August 20, 1975, he participated in the loading of narcotic and non-narcotic substances on a truck destined for Buena Park, California. He identified petitioner MARSHALL BUCK WOOLEN as the driver of that truck. (RT 90, L 6-25). He testified that the narcotic substance, hydromorphone, was loaded six to eight feet from the rear doors of the trailer. (RT 91, L 11-13). Thomas testified that he sealed the doors of the trailer after it was loaded (RT 92, L 10-14). Thomas testified that petitioner MARSHALL BUCK WOOLEN stacked the narcotic substances in the truck and that MARSHALL BUCK WOOLEN was assisted by petitioner GALE NORMAN KEELIN. (RT 93, L 5-25). Thomas stated that during the loading procedure

that none of the boxes broke open. (RT 93, L 25; RT 94, L 1-11).

Gene Click, an employee of Wyeth Laboratories in Buena Park, California, testified that he was on duty on August 28, 1975, and that he participated in the unloading of a shipment of narcotic and non-narcotic substances. (RT 107, L 8-18). Click stated that when the truck arrived that he saw the driver unfastening the side door of the trailer. (RT 107, L 19-25). He testified that when he arrived at the truck the seals were already broken. (RT 110, L 6-8). He stated that this was the first time in four years that he had unloaded a truck where the seals were already broken. (RT 109, L 21-24). He stated that he had made no report concerning the seals. (RT 115, L 17-23). Click testified that he unloaded the hydromorphone and that it was located in the center of the

truck, halfway between the side door and the back door. (RT 113, L 5-10). Click was unable to identify petitioner BUCK EUGENE WOOLEN as the driver of the vehicle. Click stated that BUCK EUGENE WOOLEN looked familiar as being at the Wyeth warehouse at one time or another. (RT 108, L 9-24).

John Dark, an employee of Wyeth Laboratories at Buena Park, California, testified that he received the seals from the truck in question from Gene Click, checked the numbers on the seals, and threw them away. (RT 120, L 13-23). Dark testified that he made a notation on the bill of lading that the seals were okay. (RT 126, L 10-14). He testified on re-direct that this meant that the numbers on the seals were the correct numbers. (RT 127, L 1-5).

Dark stated that he checked the contents of the trailer as it was being

unloaded and found it to be 10 cases of hydromorphone short. (RT 121, L 9-13).

William Hare, Drug Enforcement Administration Agent, testified that he met petitioners ROBERT LEE WOOLEN and GALE NORMAN KEELIN on August 30, 1975, at the Black Angus Restaurant in Tucson. (RT 130, L 8-25; RT 131, L 1). Hare stated that he discussed with ROBERT LEE WOOLEN and GALE KEELIN the purchase of ten (10) cases of morphine for $21,000 and three hundred pounds of marijuana. (RT 133, L 18-20). Hare testified that he spoke to petitioner ROBERT LEE WOOLEN later that day and that a new purchase price of fifteen thousand dollars ($15,000) and four hundred and fifty (450) pounds of marijuana was agreed upon.

Hare testified that he met with petitioner ROBERT LEE WOOLEN at the El Con Shopping Center at about 7:00 p.m. (RT 134, L 22-25). Hare stated he con-

versed with petitioner ROBERT LEE WOOLEN and showed him the money. Hare testified that ROBERT LEE WOOLEN showed him ten (10) cases of morphine which were in the trunk of his vehicle. (RT 135, L 1-25); RT 136, L 1).

Petitioner ROBERT LEE WOOLEN was arrested at this point. Petitioner GALE NORMAN KEELIN who was seated in a vehicle about 100 feet away was also arrested. (RT 136, L 8-16). Hare testified that he had originally contacted petitioner ROBERT LEE WOOLEN through a person named Arnold Escamilla. Hare stated that he called the phone number of Arnold Escamilla and that he called petitioner ROBERT LEE WOOLEN to the telephone. Hare stated that this was the first time he had spoken to ROBERT LEE WOOLEN. (RT 142, L 6-22).

Dennis Ray Gonzalez, Drug Enforcement Administration Agent, testified

that he participated in the arrest of petitioners ROBERT LEE WOOLEN and GALE NORMAN KEELIN. He stated that he advised KEELIN of his constitutional rights. (RT 150, L 6-14).

Fred C. Ball, Drug Enforcement Administration Agent, testified that Agent Bock was interviewing petitioner KEELIN and that he heard KEELIN tell Agent Bock that he was there only to transport the marijuana and that he was making twenty-five percent off the top. (RT 160, L 14-25; RT 161, L 1-3).

John Saunders, fingerprint specialist for the Federal Bureau of Investigation, testified that one fingerprint of petitioner MARSHALL BUCK WOOLEN appeared on one of the hydromorphone boxes and that two fingerprints of petitioner BUCK EUGENE WOOLEN appeared on one of the hydromorphone boxes. (RT 174, L 6-25).

At the end of the Government's case

in chief counsel for appellants made a Motion for Judgment of Acquittal. (RT 180-182). The court denied the Motions for Judgment of Acquittal stating:

> "I have no doubt about Counts two, three and four as to the sufficiency of the evidence to go to the jury. I'm going to let Count one go but if there is a finding of guilty on it, I will probably set it aside. I have great difficulty with Count one." (RT 184, L 2-6).

Petitioner MARSHALL BUCK WOOLEN testified on his own behalf. He testified that he loaded the goods on to his truck. He stated that during the loading process that several boxes fell open and that he handled the contents of the boxes prior to stacking them on his truck. (RT 198, L 25; RT 199, L 1-23).

He stated that he had mechanical trouble with his truck and that he spent some time attempting to repair it at his garage in Benson, Arizona. MARSHALL BUCK WOOLEN testified that the repair work could not be completed in Benson so he drove the truck to Tucson to the home of petitioner ROBERT LEE WOOLEN. (RT 204, L 10-25; RT 205, L 25; RT 206, L 1-18). The truck remained at petitioner ROBERT LEE WOOLEN'S house about four (4) hours. He testified that after the truck was repaired that the truck left for Los Angeles, California with petitioner BUCK EUGENE WOOLEN as the driver. (RT 209, L 1-6) Petitioner MARSHALL BUCK WOOLEN testified that he had not conspired to steal and sell any of the narcotics which constituted the load in his truck. (RT 211, L 1-6).

Petitioner BUCK EUGENE WOOLEN testified that he had worked on the truck and

had driven the truck to California and unloaded it. (RT 242, L 16-24). Petitioner BUCK EUGENE WOOLEN testified that the refrigeration unit on the trailer was malfunctioning. He stated that he stuck his arm through the port hole of the trailer and picked up some of the contents in a partially opened box to check to see if they were frozen. He stated that he handled the contents and returned it to the box when he saw that it was not frozen. (RT 244, L 1-20). BUCK EUGENE WOOLEN testified that when he arrived with the load at Buena Park, California, that an employee of Wyeth Laboratories removed the seals from the truck and he unloaded the vehicle. (RT 247, L 3-24). Petitioner BUCK EUGENE WOOLEN testified that he did not take anything from the truck and that he did not know there was anything missing until he arrived at Buena Park, Calif-

ornia, and was informed of this by the Wyeth employees. (RT 248, L 21-25; RT 249, L 1-16).

At the termination of the trial, counsel for petitioners renewed their Motions for Judgment of Acquittal (RT 2710-272). The motions were denied. (RT 272, L 13-15).

Counsel for petitioner ROBERT LEE WOOLEN made a motion for a mistrial on the basis that Mr. Heurlin, Assistant United States Attorney, had been seen conversing with a juror. (RT 272, L 16-18). After the jury had returned its verdict the Court asked Juror James Roach whether he had a conversation with Mr. Heurlin. Mr. Roach stated that he had not. (RT 363, L 1-15). Mr. Heurlin also stated that he had not conversed with Mr. Roach. (RT 152, L 17-25; RT 153, L 1-13). The Court stated that on the basis of these statements the matter

was terminated. (RT 364; RT 1-3).

Following conviction by the jury, judgment was entered against all petitioners. Counsel for petitioners then filed a Motion for Judgment of Acquittal, a Motion to Set Aside the Verdict of Guilty, and a Motion for a New Trial. (CR 218-241). Those motions were denied. Petitioners thereupon appealed from the Judgment to the Ninth Circuit Court of Appeals. The Ninth Circuit Court of Appeals affirmed the Judgment of the District Court and denied a Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

1. There exists a conflict between decisions of the Courts of Appeals and a conflict between decisions of the Courts of Appeals and this Court.

The initial question presented by petitioners herein is whether it constituted reversible error to allow all four of the petitioners to proceed to trial on both Count I and Count III of the Indictment. Count I of the Indictment charged all petitioners with a violation of the general conspiracy statute, to wit: Title 18, United States Code, § 371. The specific crime enumerated thereunder was embezzling and stealing goods and chattels having a value in excess of $100.00 from an interstate shipment of freight. Count III of the Indictment again charged all petitioners with conspiring to possess with intent to dis-

tribute the same goods allegedly embezzled and stolen from interstate commerce, to wit: a Schedule II narcotic drug in violation of Title 21, United States Code, § 841(a)(1).

Petitioners contend that Counts I and III of the Indictment are multiplicitous and that the respondent should have been required to elect between them or have one of them dismissed by the Court prior to trial.

In Braverman v. United States, 371 U.S. 49 (1942), this court held that one agreement cannot be construed to constitute several separate conspiracies simply because the single agreement violates several statutes. The Braverman case is the foundational case of all multiple conspiracy decisions that followed and there has been a tremendous diversity in the construction placed upon Braverman by the various Courts of Appeals.

This problem is compounded by confusion that exists between cases involving a general conspiracy coupled with a specific conspiracy, as distinguished from cases involving two specific conspiracies. This confusion stems in part from the fact that Title 18, United States Code, § 371, formerly was the sole conspiracy statute utilized in the Federal Courts. Subsequent to the promulgation of that statutory provision, various other specific conspiracy statutes have been created by the legislative branch. These include, but are not limited to, various narcotics and marijuana conspiracies such as are found in the case at bar.

In United States v. Honneus, 508 F.2d 566 (1st Cir. 1974), it was held that multiple prosecutions were not sustainable on two specific narcotics conspiracies, to wit: Conspiring To Possess

Marijuana (Title 21, United States Code, § 846), and Conspiring to Import Marijuana (Title 21, United States Code, § 963). In accord with this decision is that of the Sixth Circuit Court of Appeals in United States v. Adcock, 487 F.2d 637 (6th Cir. 1973).

However, the Ninth Circuit Court of Appeals and the Fifth Circuit Court of Appeals have specifically held that prosecutions are sustainable under two specific narcotics conspiracy statutes. United States v. Marotta, 518 F.2d 681 (9th Cir. 1975); United States v. Houltin, 525 F.2d 943 (5th Cir. 1976). This constitutes a clear conflict between the circuits, and a conflict between decisions of the various Courts of Appeals and this Court on this issue.

However, the Fifth Circuit has carved out an exception to the application of the principal enunciationed in

Houltin, supra. In United States v. Mori, 444 F.2d 240 (5th Cir. 1971), the defendant was charged with a violation of the general conspiracy statute (Title 18, United States Code, § 371), and a specific narcotic conspiracy (Title 21, United States Code, § 174), which is exactly the situation in the instant case. The Fifth Circuit Court of Appeals vacated the sentences on the conviction under both counts and remanded the case for imposition of sentence on only a single count. The reasoning behind the decision was that where specific conspiracy statutes have been enacted, Congress intended to replace and not supplement the general conspiracy statute.

Furthermore, in United States v. Marotta, supra, the Ninth Circuit Court of Appeals specifically recognized this distinction. United States v. Marotta, supra at 684. However, in the instant

case the Ninth Circuit specifically refused to apply this distinction.

In the case at bar, the petitioners were charged with a general conspiracy and a specific narcotics conspiracy. Therefore, the Mori principal should have been applied even if the Court refused to adopt the position taken by the First and Sixth Circuits in Honneus, supra, and Adcock, supra. The decision of the Ninth Circuit herein was a clear misapplication of the Marotta decision.

Furthermore, the Ninth Circuit Court of Appeals relied in the instant case upon Gore v. United States, 357 U.S. 386 (1958), as being the foundational decision for Marotta and justifying its application to these facts. However, the Ninth Circuit mistakenly relied upon Gore since Gore did not involve any allegation of a conspiracy whatsoever. It did involve multiple counts, all of

which were substantive, and parts of a single chain of events. However, conspiracy charges are materially distinguishable from this factual situation in that it is the agreement that is the essence of the crime in a conspiracy. See United States v. Basurto, 497 F.2d 781 (9th Cir. 1974).

Therefore, petitioners respectfully submit that certiorari should be granted on this issue due to the fact that there is a clear conflict between various circuits of the United States Courts of Appeals in construing the applicability of the principal initially enunciated in Braverman. Furthermore, the decisions of two circuits are in clear conflict with the Braverman decision. Finally, assuming arguendo that the rule enunciated in Marotta is a correct one, the Ninth Circuit erroneously applied that rule to the factual posture of this case

in that they refused to allow the Mori decision to be dispositive of the issues raised herein.

2. The following questions presented each involves significant constitutional issues which were resolved adversely to Petitioners by the Ninth Circuit Court of Appeals.

A. IT IS SUBMITTED THAT THE ISSUE DISCUSSED HEREIN RELATING TO THE MULTIPLICITOUS NATURE OF THE INDICTMENT CONSTITUTES A SUBSTANTIAL CONSTITUTIONAL ISSUE MERITING THE GRANTING OF CERTIORARI BY THIS COURT, IN ADDITION TO BEING A SITUATION WHERE THERE IS A CONFLICT BETWEEN VARIOUS CIRCUITS AND THIS COURT.

B. AS TO THE PETITIONERS BUCK EUGENE AND MARSHALL BUCK WOOLEN,

WHETHER IT WAS REVERSIBLE ERROR TO ALLOW THEIR TRIAL TO PROCEED TOGETHER WITH THAT OF THE PETITIONERS GALE NORMAN KEELIN AND ROBERT LEE WOOLEN.

In the instant case, the petitioner ROBERT LEE WOOLEN was willing to give testimony of an exculpatory nature on behalf of the petitioners BUCK EUGENE WOOLEN and MARSHALL BUCK WOOLEN, but declined to do so, exercising his rights pursuant to the Fifth Amendment of the United States Constitution. However, petitioners BUCK EUGENE WOOLEN and MARSHALL BUCK WOOLEN clearly had the right under the Sixth Amendment to the United States Constitution to be allowed to have access to any and all testimony of an exculpatory nature in their trial. It is therefore respectfully submitted that the trial of petitioners MARSHALL BUCK WOOLEN and BUCK EUGENE WOOLEN

should have been held separate from that of the petitioner ROBERT LEE WOOLEN in order to allow all of the rights of each of the foregoing petitioners to be fully exercised.

The Court's attention is respectfully directed to United States v. Schuford, 454 F.2d 772 (4th Cir. 1971), wherein the Court stated as follows:

> "The reported decisions support the proposition that a severance is obligatory where one Defendant's case rests heavily on the exculpatory testimony of his co-defendant, willing to give such testimony but for the fear that taking the stand in the joint trial he would jeopardize his own defense* * * In a situation where the illusive quality of credibility is of such

importance, the jury should have the benefit of all relevant testimony likely to shed light on the situation."

It should be noted that even assuming arguendo that it was not clearly established that the petitioner ROBERT LEE WOOLEN was willing to give such exculpatory testimony, the same result should obtain. In United States v. Echeles, 352 F.2d 892 (7th Cir. 1965), the Court indicated the critical point was the defendant's constitutional right to access to potential exculpatory testimony. In that case, the co-defendant had not indicated that he was willing to testify in any subsequent proceedings involving the co-defendant and give him the benefit of exculpatory testimony. The Court indicated that while a single joint trial was clearly desirable from the standpoint of the administration of

the criminal justice system it "may not be had at the expense of a defendant's right to a fundamentally fair trial." 352 E2d at 986. The Court, in reversing the trial court's denial to hold separate trials, stated that the co-defendant should have had the right to at least call the co-defendant as a witness in an effort to obtain exculpatory testimony in a separate proceeding.

Furthermore, the petitioner BUCK EUGENE WOOLEN and MARSHALL BUCK WOOLEN were entitled to trials separate from the other two appellants on the grounds that they took the witness stand whereas the petitioner GALE NORMAN KEELIN and ROBERT LEE WOOLEN exercised their Fifth Amendment rights. There can be no doubt that petitioner GALE NORMAN KEELIN and ROBERT LEE WOOLEN were constitutionally correct in standing mute and barring any and all comment by any other party to the

action on that fact. However, the petitioner BUCK EUGENE WOOLEN and MARSHALL BUCK WOOLEN also had a constitutional right to make comment upon the fact that they had taken the witness stand in their own defense. However, in the joint trial held in this case there clearly existed a clash between these two rights with the result that petitioner MARSHALL BUCK WOOLEN and BUCK EUGENE WOOLEN were not allowed to make any comment whatsoever on that fact.

In Deluna v. United States, 308 F.2d 140 (5th Cir. 1962), the Court was faced with a situation analagous to the one at bar. The Court indicated that there definitely was a clear conflict between a non-testifying defendant's Fifth Amendment Right and a testifying defendant's absolute right to comment upon the fact that he testified and to receive a jury instruction on that issue. The Court

indicated that the only proper resolution of such a conflict is to grant separate trials to each Defendant.

The Ninth Circuit Court of Appeals refused to adopt this argument urged by petitioners on two separate grounds. First, that it was not shown that the petitioners might stand a better chance of acquittal in a separate trial, and, secondly, that the exculpatory evidence was only conclusory in nature. In the words of the Ninth Circuit, the manner that petitioner ROBERT LEE WOOLEN would "exculpate" his brother and nephew was "left in the clouds".

It simply cannot be disputed that testimony of the type set forth in the Affidavit submitted by petitioner ROBERT LEE WOOLEN, as well as the letter written to his probation officer, copies of which are attached in the Appendix to this Petition and incorporated by refer-

ence herein, would clearly have afforded petitioners BUCK EUGENE WOOLEN and MARSHALL BUCK WOOLEN a better chance of acquittal. This type of evidence would have measurably enhanced their chances of obtaining a verdict of not guilty and such evidence was available to them only if petitioner ROBERT LEE WOOLEN was granted a trial separate and apart from the foregoing petitioners.

Similarly, the evidence set forth in the aforementioned documents is specific in nature and sets forth with great detail how the testimony to be offered by petitioner ROBERT LEE WOOLEN would, indeed, have been clearly exculpatory as to the aforementioned petitioners.

However, it is respectfully submitted that the proper way to resolve this matter in order to determine whether or not petitioner ROBERT LEE WOOLEN

would give testimony which would have been truly exculpatory and whether or not such testimony would have afforded petitioners MARSHALL BUCK and BUCK EUGENE WOOLEN a better chance of acquittal was to remand the case to the District Court on this issue for an evidentiary hearing. That is exactly the procedure suggested by appellants' counsel during oral argument in this case and exactly the procedure followed by the Ninth Circuit in United States v. Beard and Bishop, No. 74-1316 and 74-1217, Opinion dated July 1, 1974, and Amended December 31, 1974.

C. WHETHER PETITIONERS ROBERT LEE WOOLEN AND GALE NORMAN KEELIN WERE DENIED THEIR CONSTITUTIONAL RIGHT TO A FAIR TRIAL DUE TO THE INEFFECTIVE ASSISTANCE OF THEIR COUNSEL.

The Petitioners ROBERT LEE WOOLEN

and GALE NORMAN KEELIN were represented by counsel other than counsel undersigned at the time of trial in this matter. Trial counsel failed to raise the following issues at the trial level and, therefore, failed to fully protect the named petitioners' right to a fair trial. The specific allegations of misconduct include the following:

1. Failure to raise any objection whatsoever to the multiplicitous counts as charged in the Indictment;

2. Trial Counsel's failure to request in writing or orally any questions whatsoever on voir dire of the jury;

3. Failure to make any objection whatsoever during the prosecutor's highly improper argument during the rebuttal phase of the case;

4. Failure to discover prior to trial the identity of the informant, Arnold Escamilla, and to fully investi-

gate and develop, even after learning of him during trial, his role in the case and what type of defense that might have offered to petitioners herein.

5. Failure to request a hearing out of the presence of the jury on the in-court identification of petitioner GALE NORMAN KEELIN by William Thomas in order to determine whether or not there was any improper out-of-court lineup or any other suggestive practice;

6. Failure to make any attempt whatsoever in order to determine whether or not the totality of circumstances attending this identification made it so inherently unreliable as to make excludable under due process standards, assuming arguendo that there was no pre-trial taint of that identification;

7. Failure to cross-examine that witness at all on any of the factors set forth in Neil v. Biggers, 409 U.S.

188 (1972), in order to develop that the alleged identification was an extremely weak one and entitled to no probative value whatsoever;

8. Failure to object in any fashion whatsoever to the inculpatory statements allegedly made by the petitioner KEELIN and to make any attempt whatsoever to exclude them on either voluntariness grounds or grounds arising out of failure to properly warn petitioner KEELIN pursuant to Miranda v. Arizona, 384 U.S. 436 (1966);

9. Failure to advise the trial judge that petitioner ROBERT LEE WOOLEN was extremely ill and running a temperature of 102 degrees at the commencement of the trial. The trial judge was properly angered at petitioner's trial counsel for his failure to raise this until after the jury had been impaneled and jeopardy had attached. This cer-

tainly casts extreme doubt on the petitioner WOOLEN'S opportunity to fully assist his counsel during the trial;

10. Failure to give any opening statement whatsoever as to any of the very substantial issues in the case as to the guilt of petitioner KEELIN. These include the fact that there would be no credible evidence that the petitioner KEELIN was ever involved with the shipment of goods from Pennsylvania to Tucson, that he was not employed by a trucking company, that all but one of the witnesses present at the time the truck was loaded did not recall him being there, and that there was no evidence whatsoever that KEELIN ever entered into any conspiracy with anyone involving the theft of the goods;

11. That trial counsel failed to call any witnesses whatsoever in support of the allegation that a member of the

jury had been seen talking with one of the prosecutor's in the case in spite of the fact that he admitted that petitioner ROBERT LEE WOOLEN was strongly urging misconduct on this issue based on his personal observation;

12. That no evidence whatsoever was introduced as to petitioner KEELIN's alibi that he was working in Snowflake, Arizona, during the time the alleged offenses were committed. No records or documents such as payroll checks, time cards or phone bills were ever introduced to establish that KEELIN was not in Pennsylvania at that time, nor did trial counsel call any co-workers whatsoever to establish this fact;

13. That trial counsel failed to develop in any fashion whatsoever the issue of possible entrapment arising out of the conduct of Arnold Escamilla;

14. That the closing argument of

trial counsel completely failed to address itself to any of the important issues in this case other than the fact that "juries ought not to convict individuals in a case where a snitch is involved". Trial counsel failed to point out that there was complete lack of evidence as to any agreement or conspiracy such as that charged in Count I, and failed to ever develop the concept of reasonable doubt and how it might effect the jury's deliberation in the case.

Petitioners concede that many of the specific points discussed herein do not, ipso facto, rise to the level of ineffective assistance of trial counsel and require a new trial. However, the cumulative effect of all of the foregoing, and the pattern established thereby, clearly rises to the level of ineffective assistance of counsel, and, therefore, a denial of appellants' right to a fair

trial. This becomes especially apparent when it is coupled with the fact that during examination by the Government of the great majority of the witnesses in this case, trial counsel failed to make any objections whatsoever. He even failed to join in objections which were successfull raised by other counsel. Furthermore, he failed to ask a number of questions on cross-examination of a variety of witnesses which could have been of an exculpatory nature as to these petitioners. For example, he failed to fully bring out from the other witnesses testifying who were present at the time the truck was initially loaded in Pennsylvania that they had not made any identification of the petitioner KEELIN. This became extremely important when one witness did indicate he felt that petitioner KEELIN was present at that time.

In reviewing the foregoing, the Ninth Circuit stated that the alleged derelictions of duty simply may have reflected tactical decisions, all of which, in retrospect, might have been wrong, and that trial counsel gave his clients "adequate representation". It is respectfully submitted that this conduct is not "adequate representation" and, furthermore, that "adequate representation" simply does not meet constitutional muster. See Brubaker v. Dixon, 310 F.2d 30 (9th Cir. 1962).

It is also interesting to note in reviewing the Ninth Circuit's opinion in this case that one of the reasons for affirming the District Court's decision on each and every argument raised by petitioner on appeal was that trial counsel had failed to timely raise the argument or objection.

D. WHETHER THE APPELLANTS WERE DENIED THEIR CONSTITUTIONAL RIGHT TO A TRIAL BY A FAIR AND IMPARTIAL JURY AS A RESULT OF AN IMPROPER VOIR DIRE EXAMINATION.

This argument is based upon the trial court's failure to ask any questions whatsoever going to the weight to be accorded by the jurors to testimony given by a Government employee and/or Government agent. This type of questioning has been specifically dealt with by the District of Columbia Circuit as well as the Tenth Circuit and on each occasion those Courts have held that it is reversible error to fail to allow voir dire questions of this type. See Brown v. United States, 338 F.2d 543 (D.C. Cir. 1964); Sellers v. United States, 271 F.2d 475 (D.C. Cir. 1959); Chavez v. United States 258 F.2d 816 (10th Cir. 1958), cert.

denied sub. nom., Tenorio v. United States, 359 U.S. 916 (1959).

E. WHETHER THE CLOSING ARGUMENT OF THE PROSECUTOR DENIED PETITIONERS THEIR RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY.

During the rebuttal phase of the closing argument, counsel for the Government apparently felt compelled to "personalize" the credibility of the Government witnesses and to assert his own feelings as to their veracity. He stated as follows:

> "The Government's witnesses, particularly those from Wyeth, well, all the Government's witnesses, would not tell a lie." (RT 324, L 9-11) (Emphasis added).

It is clear that a prosecutor has

"a reasonable degree of latitude in presentation of argument. . . ." Tenorio v. United States, supra. Petitioners concede that the prosecutor must be a vigorous advocate for his side of the case, however, "he is not at liberty to strike foul blows." Berger v. United States, 295 U.S. 78 (1935). It is respectfully submitted that when counsel sought to personally comment on the fact that Government witnesses would "not tell a lie" that he went beyond the bounds of propriety in a closing argument and denied appellants their right to a fair trial by an impartial jury. Such argument clearly exploited the influence of his office and underminded the objective detachment which should separate the prosecutor from the cause for which he argues and is expressly forbidden. See ABA Code of Professional Responsibility, D.R. 7-106 (c)(4). A significant number

of jurisdictions have passed on this type of conduct and have condemned it. In such cases where such arguments are prejudicial to defendants, courts have been quick to overturn resulting convictions. Annot. 50 A.L.R.2d 766, et seq. (1956).

In a case such as the one at bar where the evidence linking all petitioners to the conspiracy offenses charged in the Indictment is minimal and derives principally from inferences allegedly arising out of other facts, and where the credibility of different witnesses who have told different versions of the same series of facts becomes so important, conduct such as that of the prosecutor herein clearly rises to the level of reversible error.

In affirming the decision of the trial court, the Ninth Circuit again stated that this conduct was not objected to at the trial level, that instructions

could have cured the impropriety, and when viewed in the context of the arguments of petitioner MARSHALL BUCK WOOLEN'S counsel that it was not a prejudicial remark.

The issue of failure to make timely objection has been dealt with previously. It is respectfully submitted that no curative instruction could have remedied this defect and that the remark made only by trial counsel for the petitioner MARSHALL BUCK WOOLEN clearly could not have invited error as to the remaining petitioners. Furthermore, the only remark made by petitioner MARSHALL BUCK WOOLEN'S trial counsel, William O'Hearn, Esq., was that he did not think the jury had believable evidence in this case on the part of the Government. Clearly this could not have opened the door to the wholesale misconduct on the part of the prosecutor as discussed herein.

F. WHETHER THE EVIDENCE IN THE CASE AT BAR WAS CLEARLY INSUFFICIENT TO SUPPORT A CONVICTION OF ANY OF THE PETITIONERS ON COUNT I OF THE INDICTMENT AND PETITIONERS BUCK EUGENE WOOLEN AND MARSHALL BUCK WOOLEN ON COUNTS II AND III OF THE INDICTMENT.

With regard to Count I of the Indictment, which charged all petitioners with conspiring to steal goods from Interstate commerce, there was no evidence whatsoever that petitioners KEELIN and ROBERT LEE WOOLEN ever agreed to participate in any alleged theft of goods, had any conversation with any other individual regarding the foregoing, or in any fashion involved themselves in a knowing agreement to steal the controlled substance from interstate commerce. The only fact linking these petitioners with the

offense charged in Count I was the mere fact that they had possession of the contraband in Tucson, Arizona.

It is respectfully submitted that this evidence is clearly insufficient to allow the case to go to the jury on Count I of the Indictment.

There is similarly no evidence linking petitioners MARSHALL BUCK WOOLEN and BUCK EUGENE WOOLEN with any conspiracy to steal the goods from interstate commerce.

In this regard, it should be noted that the trial judge also apparently felt that there was an extremely lack of evidence on this Count since he indicated at the close of the Government's case that he would let the matter go to the jury but would probably dismiss the matter should a verdict of guilty be returned on Count I of the Indictment.

With regard to Count III of the

Indictment, which charges all petitioners with possession of the goods with intent to distribute, it is conceded that the evidence introduced at trial may be sufficient to allow the case to go to the jury as to petitioners ROBERT LEE WOOLEN and KEELIN. However, there was no evidence whatsoever that petitioners MARSHALL BUCK WOOLEN and BUCK EUGENE WOOLEN ever entered into any agreement for the possession of any goods with the intent to distribute, no evidence they had participated in any negotiations with undercover agents and no evidence that they had ever even been mentioned by any other individual in this case in that regard.

G. CONCLUSION

Therefore, it is respectfully submitted that the issues raised herein represent substantial constitutional

questions meriting consideration and review by this Court.

CONCLUSION

For the reasons set forth herein, a Writ of Certiorari should issue to review the Judgment and Opinion of the Ninth Circuit Court of Appeals.

RESPECTFULLY SUBMITTED,

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2560 East 10th Street
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By _____
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Attorneys for Petitioners
Robert Lee Woolen;
Gale Norman Keelin; and
Marshall Buck Woolen.

APPENDICES

F I L E D

JUL 13 1976

EMIL E. MELFI, JR.
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, v. BUCK EUGENE WOOLEN, Appellant.	NO. 76-1291
UNITED STATES OF AMERICA, Appellee, v. MARSHALL BUCK WOOLEN, Appellant.	NO. 76-1292
UNITED STATES OF AMERICA, Appellee, v. GALE NORMAN KEELIN, Appellant.	NO. 76-1315

UNITED STATES OF AMERICA, Appellee, v. ROBERT LEE WOOLEN, Appellant.	NO. 76-1316 MEMORANDUM

Appeal from the United States District Court District of Arizona

Before: WRIGHT, KILKENNY and SNEED, Circuit Judges.

In a jury trial, all appellants were convicted under Count I of conspiracy to steal hydromorphone having a value of in excess of $100.00 from an interstate shipment, in violation of Title 18, U.S.C. § 371, and under Count III of conspiracy to distribute hydromorphone in violation of Title 21, U.S.C. § 846. Appellants Marshall Buck Woolen and Buck Eugene Woolen were convicted under Count II of theft of goods (same drug) having a value in excess of $100.00 from an interstate

shipment in violation of Title 18, U.S.C. § 659, and appellants Robert Lee Woolen and Gale Norman Keelin were convicted under Count IV of possession with intent to distribute in violation of Title 21, U.S.C. § 841 (a) (1). From judgments and sentences entered on the verdicts they appeal. We affirm.

THE FACTUAL SUMMARY

In summarizing the facts, we must look at the evidence in harmony with the jury's verdict, resolving all conflicts in favor of the government.[1]

On or about August 20, 1975, Marshall Buck Woolen (Marshall Buck), the owner of a motor truck and trailer he operated through Colyer Trucking Company of Tucson, Arizona, picked up a load of what he

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[1] Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Moore, 522 F.2d 1068, 1079 (CA9 1975), cert. denied ____U.S.____(January 13, 1976).

knew to be narcotic drugs and medicine at the Wyeth Laboratories in Radnor, Pennsylavania. He assisted in loading the cargo into his trailer. After the cargo was loaded, the doors of the trailer were sealed. Included in the shipment were ten cases of hydromorphone, a controlled narcotic. The hydromorphone was loaded thirty feet from the front of the trailer and six to eight feet from the doors with boxes of non-narcotic drugs surrounding the hydromorphone. None of the boxes broke open during the loading process. Marshall Buck signed the bill of lading which read: "Drugs and Medicine."

Marshall Buck left Pennsylvania on that day, and after experiencing considerable difficulty with the truck enroute, arrived at Benson, Arizona, Tuesday morning, August 26, 1975, where he parked the truck and trailer in front of his garage. After arriving in Benson, he

met his son, Buck Eugene Woolen (Buck Eugene), and his brother, Robert Lee Woolen (Robert Lee). On August 27th, Marshall Buck drove the truck to Robert Lee's residence in Tucson. On August 28, 1975, Buck Eugene delivered the shipment, minus the ten cases of hydromorphone, to Wyeth Laboratories at Buena Vista, California. Before delivery, Buck Eugene, without authorization, had removed the seals and opened the door to the trailer.

Two days later, on August 30, 1975, Robert Lee and appellant Marshall Buck's brother-in-law, Gale Norman Keelin (Keelin), met with two undercover agents at the Black Angus Restaurant in Tucson for the purpose of negotiating a sale of a quantity of morphine. During the course of the restaurant conversation, Robert Lee said he had ten cases of morphine for sale, approximately 6,000 dosage

units. He quoted a sales price of $35,000.00 in cash for the ten cases. The two agents discussed the price and told Robert Lee and Keelin that they only had $21,000.00 in cash. Robert Lee said there were several other people involved and he had to receive some profit from the narcotics sale and would not lower the price. During the course of the conversation, Keelin told the agents that the quality of the merchandise was good and assured the agents that they could sell it and make a profit. In the same conversation, Keelin discussed marihuana and said he was knowledgeable about marihuana sales and purported to be a retail marihuana dealer himself. Since the agents were short of cash, the agents asked if they could make a deal if they threw in 300 pounds of marihuana. After Robert Lee and Keelin consulted with each other, they agreed to accept

this proposal. The agents gave Robert Lee the undercover phone number of their office. He agreed to call about 6:00 P.M. that evening and give them a definite answer. About 6:00 P.M. that evening, Robert Lee called. Earlier, in another phone conversation, he had been told by the agents that they had available only $15,000.00, but that they would throw in an additional 150 pounds of marihuana if that would make him happy. The final telephone negotiated sale was $15,000.00, plus 450 pounds of marihuana for the ten cases of hydromorphone. They all agreed to meet at the El Con Shopping Center at 7:00 P.M. that evening to make the exchange.

Agent Hare arrived at the El Con Center about 6:50 P.M. He had given Robert Lee the description of the car which he was to drive. Robert Lee drove up in a 1968 Lincoln. When asked if he was

by himself, he said "No, that his partner Keelin was around somewhere." He requested to see the money and the marihuana. The agent told him to follow. Robert Lee got into his car, the agent got into his and they drove him to the western portion of the parking lot where two additional undercover agents were seated in a government truck which contained the money and the marihuana. At that time, Agent Hare observed Keelin in a GMC pickup truck with a camper about 100 feet from where they were parked. When Robert Lee got out of the Lincoln and into the front seat of the government truck, Agent Ball handed him a sample of marihuana. Robert Lee then started to examine the money. After this examination, the agent asked to inspect the hydromorphone, at which time Robert Lee walked over to his automobile and lifted the trunk lid. The trunk contained the ten cases of what he

said was morphine. Nine of the ten cases bore the Wyeth factory seal. The tenth case was open and had greasy, smudgy fingerprints on it. At that time, Keelin was still seated in his pickup. Robert Lee and Keelin were then placed under arrest.

During the course of the trial, the cases of hydromorphone were identified as the same cases loaded into Marshall Buck's trailer in Pennsylvania on August 20th. The fingerprints of both Marshall Buck and of Buck Eugene were found on the broken box of hydromorphone. Although Marshall Buck claimed that he handled the contents of boxes when the boxes broke open while he was throwing them into the trailer, it is clear that the jury did not believe his story, nor did they believe his testimony that he did not know what was contained in the shipment though he signed the bill of lading which

clearly read "Drugs and Medicine." Additionally, his claim that he reached into the trailer through a porthole located in the front of the trailer and handled the hydromorphone was disregarded by the jury. Obviously, the jury believed that the drug was not located in a place where he could touch it by reaching through the porthole. Buck Eugene's story to the same effect was also disregarded by the jury. Manifestly, Keelin was interested in the transaction. There is evidence that he was to receive twenty-five percent of the sales price "off the top." Whether the twenty-five percent was "off the top" of the value of the marihuana or morphine, or both, is of no importance. The sale of the hydromorphone was an integral part of appellants' agreement to take delivery of the marihuana.

ISSUES ON APPEAL

I.

Are Counts I and III multiplicious?

II.

Should the district court have granted a separate trial to defendants Marshall Buck Woolen and Buck Eugene Woolen?

III.

Did the court made an adequate voir dire examination of the jury?

IV.

Was the prosecutor's closing argument prejudicial?

V.

Was the evidence sufficient to sustain the verdicts against Marshall Buck Woolen and Buck Eugene Woolen?

VI.

Were defendants Robert Lee Woolen and Gale Norman Keelin effectively represented by counsel?

MULTIPLICITY OF COUNTS

Appellants reliance on Braverman v. United States, 317 U.S. 49 (1942), is misplaced. There, the Supreme Court held that a single agreement to commit several unlawful acts could not be punished by multiple convictions under the general conspiracy statute. However, the court distinguished such a case from a situation where, as here, a single act violates more than one statute. United States v. Marotta, 518 F.2d 681, 684-685 (CA9 1975), places Braverman in proper perspective and holds that prosecutions for conspiracy under separate counts on a single chain of events for separate statutory violations are not multiplicious. The Marotta court followed the view expressed in Gore v. United States, 357 U.S. 386 (1958), where the Court said:

". . . The fact that an offender violates by a single transaction several regulatory con-

trols devised by Congress as means for dealing with a social evil as deleterious as it is difficult to combat does not make the several different regulatory controls single and identic. . . ." Id. at 389.

We hold that Marotta is controlling and that Counts I and III are not multiplicious.

SEVERANCE

On appeal, for the first time, Marshall Buck and Buck Eugene argue that their trial should have been severed from the trial of the other two defendants. No request for severance was made in the district court. Rule 12 (b) (5), FRCrimP, provides,

"The following must be raised prior to trial;

* * * * * *

"(5) Request for a severance of . . . defendants under Rule 14."

Even if presented in a proper manner, the granting or denial of a severance is a matter within the trial court's discretion. Shaffer v. United States, 362 U.S. 511 (1960); Opper v. United States, 348 U.S. 84, 94-95 (1954), and United States v. Campanale, 518 F.2d 352, 359 (CA9 1975), cert. denied _____ U.S. _____. It is universally accepted that a joint trial of persons charged with committing the same offense, or being accessories to its commission, is the rule, rather than the exception. There is a substantial public interest in the joint trial of such persons. United States v. Camacho, 528 F.2d 464, 470 (CA9 1976). Consequently, even if a severance issue had been raised in the district court, reversal for failure to

grant a severance would be appropriate only if the court abused its broad discretion. Opper, supra at 95. To meet his burden, a defendant must show more than that a separate trial might offer him a better chance of acquittal. Campanale, supra at 359. The real test is whether a joint trial is so prejudicial to one defendant as to require the exercise of the district court's discretion in only one way, that is, by ordering a separate trial. United States v. Thomas, 453 F.2d 141, 144 (CA9 1971), cert. denied 405 U.S. 1069 (1972).

Under the totality of circumstances in this case, we decline to bypass the requirements of Rule 12 (b) (5) and declare that the court, on its own motion, should have declared a severance. The plain error provisions of Rule 52 (b), FRCrimP, are not applicable.

After commencing this appeal, Marshall Buck supplemented his argument on

severance by submitting copies of a motion for a new trial and supporting affidavits, the originals of which were filed in the district court. He suggests a remand to the United States District Court for a hearing on the motion.

The affidavit of Robert Lee, attached to the motion, indicates that, if tried separately, he was willing prior to the time of trial, and at the time he made the affidavit ". . . to give testimony of an exculpatory nature on behalf of defendants Marshall Buck Woolen and Buck Eugene Woolen." (Emphasis supplied.) He further states that he communicated this information to his trial counsel, Mr. Rubi. Marshall Buck's attorney filed an affidavit that such information was never conveyed to him by counsel for Robert Lee. We observe that the material contents of the principal affidavit are conclusory only. The affidavit does not

attempt to disclose the nature of the alleged exculpatory evidence. In what manner he would "exculpate" his brother and nephew is left in the clouds. We are as capable as the trial court of passing on the sufficiency of the affidavits, in particular the conclusion of law. United States v. Consolidated Laundries Corp., 291 F.2d 563 (CA2 1961), and conclude that they are wholly insufficient. We reject the suggestion to remand.

THE VOIR DIRE EXAMINATION

Because appellants did not raise this issue at the time of trial, we have no obligation to examine into its merits. This is made clear by Rule 24 (a), FRCrimP, which permits the defendant, or his attorney, to supplement the examination or to submit to the court such additional questions as the parties might desire propounded tc the jury. In the absence

of a timely request, appellants will not ordinarily be heard to complain.

Moreover, instead of asking to supplement the court's examination or to submit to him additional questions, the appellants, being apparently satisfied with the court's voir dire,[2/] to all intents and purposes agreed that the examination was adequate. Inasmuch as appellants did not take advantage of Rule 24 as interpreted in United States

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2/ "THE COURT:

* * * * *

"That concludes the voir dire.

MR. DRAKE: The United States has no questions, Your Honor. We pass the panel.

MR. RUBI: No questions, Your Honor.

MR. ZAPATA: As to Buck Eugene Woolen, Your Honor, we have no questions and pass the panel.

MR. O'HEARN: We will pass the panel also, Your Honor." (R.T., pp. 20, 22.)

v. Blosvern, 514 F.2d 387, 388-389 (CA9 1975), we reject their attempt to bypass the rule and raise this issue for the first time on appeal. Additionally, our examination of the record convinces us that the voir dire was sufficient. United States v. Erickson, 472 F.2d 505 (CA9 1973).

PROSECUTORIAL MISCONDUCT

While we do not place our stamp of approval on the prosecutor's argument,[3] we must bear in mind that appellants failed to object. If a timely objection had been made, the court by a proper instruction could have cured any possible

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3/ "The Government's witnesses, particularly those from Wyeth, well, all the Government's witnesses, would not tell a lie. It is a crime to lie under oath, it is perjury. And what motive would they have for risking something of that nature if they were to come over here and take the stand and swear and tell a lie, what sense does that make?" (R.T., p. 324).

impropriety. United States v. Bashaw, 509 F.2d 1204 (CA9 1975); United States v. Zumpano, 436 F.2d 535, 539 (CA9 1970). Viewing the prosecutor's remarks in context with the arguments of appellants' counsel,[4] we hold that they were not prejudicial, and were harmless under Rule 52 (a), FRCrimP. See Lawn v. United States, 355 U.S. 339, 359 n. 15 (1958); Chatman v. United States, 411 F.2d 1139, 1142 (CA9 1969).

This is not a case like Doyle v. Ohio, _____ U.S. _____ (June 17, 1976), where the Supreme Court condemned the prosecutor's misconduct in continually cross-examining the appellants on their

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4/ 'MR. O'HEARN:

* * * * *

". . . I think we are entitled in a trial of this nature to have decent, reliable, believable evidence before we can condemn a person for a criminal act. I don't think we have that in this case on the part of the Government."
(Emphasis supplied. R.T., p. 307.)

failure after arrest to speak up and tell their stories and in pursuing such conduct in repeatedly emphasizing such failure in his argument to the jury. Clearly, this persistent misconduct effectively denied Doyle his constitutionally protected right to remain silent. The decision in Doyle has no application to the prosecutor's indiscretion here challenged by appellants.

SUFFICIENCY OF THE EVIDENCE TO SUSTAIN THE JURY'S VERDICT

Appellants argue that there is insufficient evidence to convict any of them of the conspiracy charged in Count I. It is also argued that the evidence is insufficient to support convictions of Marshall Buck and Buck Eugene on Counts II and III of the indictment. A repetition of the evidence would serve no useful purpose.

COUNT I

As we previously mentioned, we must view the evidence in the light most favorable to the prosecution. We are convinced there is sufficient direct and circumstantial evidence to sustain appellants convictions on the conspiracy to steal goods from interstate commerce. As recently as June 1, 1976, in United States v. Cruz, No. 75-2211, _____F.2d _____, and in United States v. Turner, 528 F.2d 143, 162 (CA9 1975), cert. denied, _____ U.S. _____, we repeated our dogma that a criminal conspiracy need not be proved by direct evidence and that a common scheme or plan may be inferred from circumstantial evidence, which we have often said is not inherently less probative than direct evidence. In the same cases, we restated the uniform rule that once a conspiracy is shown to exist, only slight evidence is required to connect a coconspirator.

True, the direct evidence against Robert Lee and Keelin is stronger than it is against Marshall Buck and Buck Eugene. Nonetheless, it is inconceivable that the latter two could have left their fingerprints upon the broken box without participation in its removal from the truck. The jury did not accept Marshall Buck's explanation. It is also inconceivable that the hydromorphone could have been removed from the trailer without the knowledge and consent of either Marshall Buck or Buck Eugene or, for that matter, both. They had the exclusive possession of the truck and trailer from loading until delivery. Obviously, this was a family affair.

Here, as in Cruz and in Turner, it is not our function to interfere with the jury's verdict where the members could rationally conclude from the evidence presented and the inferences drawn

therefrom that a conspiracy had been established beyond a reasonable doubt and that the appellants were all conspirators.

COUNT II

The appellants Marshall Buck and Buck Eugene attack the sufficiency of the evidence to prove the $100.00 value alleged in Count II. The answer to this is that the negotiated sales price for the drug was $15,000.00 in cash, plus 450 pounds of marihuana. This is sufficient evidence of value. Montgomery v. United States, 403 F.2d 605, 610 (CA8 1968), cert. denied 396 U.S. 859 (1969); Jalbert v. United States, 375 F.2d 125, 126 (CA5 1967), cert. denied 389 U.S. 899.

COUNT III

Marshall Buck and Buck Eugene argue that there was insufficient evidence linking them to a conspiracy to distribute

hydromorphone. The same legal standards discussed above apply. Marshall Buck drove the truck and trailer from Pennsylvania to Benson, Arizona, where he met with Buck Eugene, his son, and Robert Lee, his brother. The following day, Marshall Buck drove the truck and trailer to Robert Lee's residence in Tucson. The next day, Buck Eugene delivered the shipment to a Wyeth branch in Buena Vista, California. When the Wyeth representative arrived, Buck Eugene had already opened the rear of the trailer and the seal was broken. Two days later Robert Lee and Keelin agreed to sell ten cases of hydromorphone to government agents. These proved to be the ten cases which had left Pennsylvania in the sealed truck driven by Marshall Buck. During the negotiations for the sale, Robert Lee claimed several other people were involved. Fingerprints of Buck Eugene

and Marshall Buck would permit the jury to infer that they aided in unloading. There is ample evidence from which the jury could infer participation in a conspiracy to distribute the hydromorphone.

COUNSEL'S REPRESENTATION

Appellants Robert Lee and Keelin retained attorney Rubi shortly after their arrest. After trial, they substituted newly retained counsel and now contend that Rubi did not effectively represent them during the trial.

Fist they argue that Rubi should have raised the issue of the multiplicity of Counts I and III. In the forepart of this opinion, we held that the counts are not multiplicious. Next they point to the failure of Rubi to suggest additional voir dire questions. This argument is answered by the fact that the other attorneys made no such suggestions and that we have held that the voir dire was

sufficient. Then Rubi is accused of incompetence in failing to discover the whereabouts of the informer Escamilla who put the agents in touch with Robert Lee. Since Robert Lee was acquainted with Escamilla there was no necessity for asking the government to reveal his identity. Moreover, it is highly improbable that this person would have benefited the appellants case. Perhaps appellants did not want to hear what he had to say. Be that as it may, attorney Rubi fully developed the Escamilla involvement in his argument to the jury.

Appellants' counsel now point to many other alleged weaknesses in the Rubi representation. Our examination of the record convinces us that this attorney gave his clients adequate representation. These hindsight revelations now seized upon by appellants' attorneys amount to nothing more than what might

well be reasonable trial tactics on the part of an attorney of above average skill. At worst, the alleged derelictions of duty may reflect tactical decisions which in retrospect might have been wrong. United States v. Stern, 519 F.2d 521 (CA9 1975), cert. denied _____ U.S. _____ (1976); United States v. Ortiz, 488 F.2d 175 (CA9 1973). In Brubaker v. Dickson, 310 F.2d 30, 37 (CA9 1962), we said: "Due process does not require 'errorless counsel . . .'" When the issue of the performance of counsel is raised for the first time on appeal, we are limited to the matters in the record. United States v. Gomez, 523 F.2d 185, 186 (CA9 1975), cert. denied _____ U.S. _____ (1976).

Whether we apply to Rubi's representation the "reasonably effective assistance" standard as stated in United States v. Smith, 447 F.2d 1117, 1119 (CA9 1971),

or the "farce or mockery test" employed in United States v. Stern, supra, at 525, the result is the same. Rubi's representation met the "reasonably effective assistance" test, the more stringent of the two.

CONCLUSION

This is not a case where an exceptional situation is presented that requires us to intervene in order to prevent a miscarriage of justice or to preserve the integrity and reputation of the judicial system. United States v. Larson, 507 F.2d 385, 387 (CA9 1974); United States v. Bacall, 443 F.2d 1050, 1063 (CA9 1971); Marshall v. United States, 409 F.2d 925, 927 (CA9 1969). Each appellant had a fair trial. Consequently, we affirm the judgments of the lower court.

IT IS SO ORDERED.

F I L E D

AUG 31 1976

EMIL E. MELFI, JR.
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, v. BUCK EUGENE WOOLEN, Appellant.	NO. 76-1291
UNITED STATES OF AMERICA, Appellee, v. MARSHALL BUCK WOOLEN, Appellant.	NO. 76-1292
UNITED STATES OF AMERICA, Appellee, v. GALE NORMAN KEELIN, Appellant.	NO. 76-1315

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT LEE WOOLEN,

Appellant.

NO. 76-1316

ORDER

Appeal from the United States District Court District of Arizona

Before: WRIGHT, KILKENNY and SNEED, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Wright and Sneed have voted to reject the suggestion for a rehearing in banc. Judge Kilkenny has voted to recommend a rejection of the suggestion for a rehearing in banc. The full court has been advised of the suggestion for an in banc hearing and no judge of the court has requested a vote on the suggestion for rehearing in banc. FRAP 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

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P.O. Box 547
San Francisco, California 94101

RE: U.S.A. v. Robert Lee Woolen, Gale Norman Keelin, Marshall Buck Woolen and Buck Eugene Woolen No. 76-1316, 76-1315, 76-1292, and 76-1291

Dear Sir:

Robert Lee Woolen, Gale Norman Keelin, Marshall Buck Woolen, and Buck Eugene Woolen intend to file in the Supreme Court of the United States a Petition for a Writ of Certiorari to review the opinion and judgment entered in the above-entitled proceedings. The Petitioners accordingly request that you prepare and certify for transmission to the Clerk of the Supreme Court of the United States a copy of the entire record that was before the United States Court of Appeals for the Ninth Circuit, in-

cluding the opinion and judgment of that Court, the Petition for Rehearing and the order denying rehearing.

Very truly yours,

McDONALD & NASH

/s/ Walter B. Nash
By Walter B. Nash III

WBN/vlc

Walter B. Nash III

LAW OFFICES

McDONALD & NASH

2560 EAST 10TH STREET

TUCSON, ARIZONA 85716

TELEPHONE (602) 327-4200

(602) 327-4209

Attorneys for Defendants Robert Lee Woolen, Gale Norman Keelin and Marshall Buck Woolen

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, vs. MARSHALL BUCK WOOLEN, et al, Defendants.	NO. CR75-621-TUC-JAW AFFIDAVIT OF ROBERT LEE WOOLEN

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

I, ROBERT LEE WOOLEN, being first

duly sworn, upon my oath, depose and say:

1. That I am a Defendant in C. 5-621, United States of America vs. Robert Lee Woolen, Gale Norman Keelin, Marshall Buck Woolen and Buck Eugene Woolen;

2. That I was willing prior to the time of trial herein and am willing at the present time to give testimony of an exculpatory nature on behalf of the Defendants MARSHALL BUCK WOOLEN and BUCK EUGENE WOOLEN, as set forth in this Motion;

3. That I communicated the foregoing to Pete Rubi, my trial counsel for the trial of this matter prior to the time of the trial.

FURTHER Affiant saith not.

/s/ Robert Lee Woolen
ROBERT LEE WOOLEN

SUBSCRIBED AND SWORN to before me this 9th day of April, 1976, by ROBERT LEE WOOLEN.

/s/ Vicki L. Covey
NOTARY PUBLIC

My Commission Expires:

October 17, 1978

Dear Joe,

When I was talking to you in your office I was very upset, with no advice from counsel, I couldn't tell you much of anything. After talking to my new attorney, he advised me to tell you the story.

I went to Benson to pick up $336.00 for a trailer payment. I talked to Marshall for about ½ hour and I ask him where he was coming from, he told me he was coming from a laboratory in Pennsylvania. I picked up the $336.00 and came back to Tucson, about 9 o'clock that evening. I returned to Benson and I went into the trailer thru the front trap door and I looked thru the trailer. I opened 40 to 50 before I found the Hydromorform. I picked up 12 cartons and proceded to take them. I moved them from the spot where they were and took them up to the trap door to take them out and I heard noises outside so I waited for a while then got back out of the trailer and came back home. The next day Marshall came up to Tucson and he was still having truck trouble, the front seal was leaking bad so he had to tear it down and replace it.

I helped him tear the truck down and we couldn't get the pully off the crank shaft. So Marshall sent Bucky out to find a gear puller as that we could finish the work on the truck. After Bucky left, Marshall went down to the parts house to pick up the seal. While he and Bucky was gone I got back in the trailer and removed 10 cartons of Hydromorform and 1 case of cough syrup and hid them, about an hour later Marshall

came back, a few minutes after Marshall came back Bucky came back with no gear puller. So we proceded to beat the gear off. After all repairs were made, Bucky left for Los Angeles and Marshall went back to Benson.

Marshall and Bucky didn't have anything to do with stealing anything off the trailer and there was no conspiring on their part on anything. They didn't know anything about it. Marshall and Bucky are guilty of hauling the load from Pennsylvania to Los Angeles, but not guilty of anything else.

Gale Keelin is not guilty of any conspiracy as far as I am concerned. I ask him to take a ride with me Saturday morning and he did. I told him what I had and that I could sell it and I ask him to help me make it look good and that we had to act like a couple of wheeler and dealers to be able to make the deal and he went along with me. If it hadn't been for me, Gale wouldn't have had anything to do with it.

I know that it was wrong in what I did, but I was in debt so far and going to lose my home and everything I worked for the last 20 years and the temptation was to great to pass up.

My youngest son is sick, my wife can't work, and I couldn't find anything to do for work. The wife went to the County for help and they refused to give her food stamps. One thing led to another and the chance came up to possibly save everything so I took it.

So if there is any possible way that

you could help me get probation I would like to move to California. I have a good job offer in northern California that I would like to be able to take.

I know it was stupid on my part but I have never been in serious trouble before and if I can get out of this with probation I will think twice before I do anything like this again. Thanks Joe.

/s/ Robert Woolen

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NUMBER_____

ROBERT LEE WOOLEN, GALE NORMAN KEELIN
MARSHALL BUCK WOOLEN and BUCK EUGENE WOOLEN,

Petitioners,

vs.

UNITED STATES OF AMERICA

Respondent.

AFFIDAVIT OF SERVICE

WALTER B. NASH III, being first duly sworn, deposes and says:

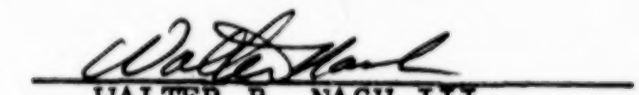
That in accordance with Rule 33(2)(a), Supreme Court Rules, he has served a copy of the following documents on the United States Attorney for the District of Arizona, Tucson, Arizona, and has forwarded by air mail three copies of the following documents to the Solicitor

General, Department of Justice, Washington, D.C. 20530, and a copy of the following documents on Frank Zapata, United States Public Defender's Office, P.O. Box 2710, Tucson, Arizona 85702, counsel for BUCK EUGENE WOOLEN, on this 27th day of October, 1976.

(1) Petition for Writ of Certiorari to the Supreme Court of the United States and attachments thereto;

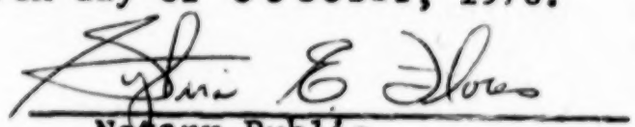
(2) Affidavit of Service; and

(3) Appearance of Counsel.



WALTER B. NASH III

SUBSCRIBED AND SWORN to before me at Tucson, Arizona, by WALTER B. NASH III, this 27th day of October, 1976.



Notary Public

My Commission Expires:

November 30, 1979.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NUMBER_____

ROBERT LEE WOOLEN, GALE NORMAN KEELIN
MARSHALL BUCK WOOLEN and BUCK EUGENE WOOLEN,

Petitioners,

vs.

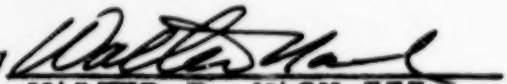
UNITED STATES OF AMERICA,

Respondent.

APPEARANCE OF COUNSEL

The Clerk will enter our appearance as Counsel for the Petitioner.

McDONALD & NASH
2560 East 10th Street
Tucson, Arizona 85716

By 
WALTER B. NASH III

The Clerk is requested to notify counsel of action of the Court by means of Airmail Letter.